

Managing the expiry of PFI contracts

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2022 saw the release of 'Preparing for PFI contract expiry' guidance by the Infrastructure and Projects Authority (IPA) which, amongst many recommendations, advised contracting authorities with a Private Finance Initiative (PFI) project in its portfolio to start preparing for expiry at least seven years prior to the expiry date itself.

A PFI project is a long-term contractual arrangement between the public and private sectors which delivers the financing and operation of public infrastructure assets and services.

As of 31 March 2021, there were reportedly 694 PFI projects with a total capital value of £54.7bn and the IPA's findings showed that the number of projects due to expire will sharply increase from 2024 over the next decade. Many contracting authorities will therefore find themselves needing to imminently navigate the often complex handback and expiry processes under their relevant PFI contracts.

Managing the handback and expiry of a PFI project involves a significant amount of work between the contracting parties and in particular the following risks might need to be managed:

Uncertain or unclear contractual provisions

Parties will need to consider the PFI contractual provisions relating to handback/ expiry with care and caution. There is limited case law on the matter of PFI handback so legal advice should be sought to ensure both parties are properly complying with their duties and the contractual procedures for the arrangement coming to an end.

Breakdown in relationships

Many PFI handback processes are time-consuming, technical and costly, which we expect will unfortunately provide fertile ground for PFI disputes to arise. Relationships between the contracting parties may sour and whilst the White Frasier Report (commissioned by the IPA and published last year) encourages a collaborative approach, we expect many disputes to arise as the condition of the PFI assets are reviewed against the contractual handback requirements.

Decline in service provision

As the unitary payments begin to decrease towards the end of a PFI project term, it may be that the incentive to comply with the contractual requirements diminishes which could result in a downturn in the quality of services provided. Proper yet pragmatic enforcement of the performance regimes within the PFI contracts should be implemented to mitigate this risk.

Running out of time

It may simply be the case for many early PFI projects that there is not sufficient time to remedy any issues within PFI assets prior to the contractual expiry date. Parties will need to work together to overcome this risk and identify solutions.

Considerations for further ahead

Looking even further ahead, public sector clients are going to need to consider the re-provision of services following the expiry of a PFI contract.

Contracting authorities will want to ensure a smooth handover and continuity of services which will require a robust strategy for either the procurement of such services or providing them in-house. And of course they may have “battle scars” from their PFI experience which they want to ensure are better addressed in their contracts next time around!

Ultimately, the message is clear - dust off your PFI contracts and start managing the contractual arrangements for their expiry.

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